

2 Information Bulletin



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CHESAPEAKE BAY LOCAL ASSISTANCE DEPARTMENT COMMENTS ON HOME BUILDERS ASSOCIATION OF VIRGINIA'S PROPOSED MODEL ORDINANCE

BACKGROUND ON HOME BUILDERS ASSOCIATION OF VIRGINIA'S ORDINANCE

In July, the Homebuilders Association of Virginia (HBAV) issued its "Chesapeake Bay Preservation Ordinance." While the Department is supportive of efforts to assist local governments in the implementation of the performance criteria, we wish to express concern about several provisions of the HBAV Ordinance which we feel are inconsistent with the Act and Regulations.

The Department has devoted the majority of this information bulletin to provide comment on those provisions of the HBAV Ordinance which confuse or contradict the requirements of the Act and Regulations. These comments follow the structure of the HBAV Ordinance.

Section 1.2 - Purpose and Intent

1. The language in this section purports to be consistent with the Act and Regulations. However, this section sets a goal of minimizing pollution, while the Act specifically calls for: *the prevention of any increase in pollution; the reduction of existing pollution; the protection of existing high-quality state waters; and the restoration of all other state waters.*
2. The section limits applicability of the ordinance to that portion of the lot or parcel within the CBPA. While this may be consistent with the Regulations, it is inconsistent with Section 2.3.D of the HBAV Ordinance which states that where a lot is partially within an IDA, the entirety of the lot is subject to the IDA performance criteria. In addition, from a practical standpoint local governments, property owners, and developers would likely find it difficult to administer or comply with performance standards on only part of a lot or parcel.

Section 1.3 - Definitions

3. The HBAV ordinance omits a definition for "agricultural lands." This omission could cause confusion as to the meaning of this term throughout the ordinance.
4. The definition for "best management practices" conflicts with the Regulations. The HBAV language replaces "the most effective, practical means" with "the greatest practical technology."

...I am of the opinion that an owner must comply with the reserve drainfield and buffer requirements on lots on which it is feasible to meet those requirements, even if the owner's rights to the use of the property might otherwise be vested under a traditional vesting analysis.

Section 2.1 - CBPAs

13. The Regulations specify RPA non-tidal wetlands as having surface flow connection and being contiguous to tidal wetlands or tributary streams. HBAV replaces "contiguous" with "adjacent" - a term which was considered in the public hearing phase and found to be less satisfactory due to related rulings in case law. The term "contiguous" is considered stronger language regarding the state of being in actual contact with or adjoining an object. The term "adjacent" is defined with the emphasis on the fact of being nearby. Therefore, the use of "contiguous" is clearly more consistent with the intent of the Regulations.
14. This section does not include "other lands" as a category of RPA features. Therefore, it does not leave a local government with flexibility to include other resources having a significant impact on water quality.
15. The HBAV ordinance includes "tributary streams" as RPA features. The Department considered the inclusion of tributary streams as RPAs during the regulatory development process, but learned that local governments have no jurisdiction over subaqueous lands. The Commonwealth of Virginia owns and regulates activities on subaqueous lands. Therefore, inclusion of tributary streams may be ultra vires.
16. The section would establish an RMA of a standard linear distance from RPA features with additional area included where there are concentrations of floodplains and non-tidal wetlands (connected by surface flow and adjacent to nontributary streams). While there is greater local discretion in designating RMAs, the Regulations require that these designations be based on consideration of several land features. The section presumes that a local government should only designate a narrow band adjacent to the stream network. It precludes local designation based on other RMA land categories and designation based on subwatershed boundaries. The definition of RMAs as presented in this section is inconsistent with the Regulations.

Section 2.2 - Intensely Developed Area (IDA) Overlay

17. The section does not establish IDAs as areas where existing development is concentrated as of the local program adoption date. Although essentially verbatim from the Regulations, subsections A, B, and C are unnecessary as they represent guidance for local governments, not an applicant.

Section 2.3 - Adoption of CBPA Map and Incorporation of CBPA and IDA Boundaries into Zoning Ordinance

18. Subsection A places sole responsibility for site-specific delineation on the land owner. This may be burdensome for individual lot owners. Local governments may wish to include a provision for allowing the administrative authority to perform the delineation where appropriate.

the implementation of local water quality protection measures under Section 10.1-2103 of the Act. Further, the calculation procedure was made part of the Local Assistance Manual required under Section 5.2 of the Regulations.

27. Section 4.1.A(3)d should be amended as these options were directed at local governments and not property owners. Most local governments will choose option (i) in developing stormwater management regulations to comply with the Act and Regulations. Retaining this language should prove confusing to an applicant or property owner.
28. The exemption for maintenance and alteration of existing stormwater management structures does not appear to be subject to local determination as required by Section 4.2.8.b of the Regulations.
29. The provision requiring a BMP maintenance agreement may not be stringent and specific enough to be consistent with Section 4.2.3 of the Regulations. Since local governments must ensure the long-term functioning of BMPs, they must have the right to approve such agreements.
30. The requirement for a conservation plan on agricultural lands does not specify compliance with the Field Office Technical Guide which distinguishes water quality conservation plans from other erosion oriented plans.
31. It should be clarified to whom evidence of all wetlands permits required by law shall be submitted. The submittal of such evidence should be in conjunction with the required plan of development process.
32. Subsection B references the Subdivision Ordinance, where Section 4.2.4 of the Regulations cites Section 15.1-491(b) of the Code. This is not an appropriate substitution of references.

Section 4.2 - Additional Performance Criteria for RPAs

33. Subsection A establishes a legal standard (preponderance of the evidence) for meeting the conditions of water-dependent development. This standard may be overly ambiguous, particularly where the terms "minimum necessary" and "where possible" are involved. In addition, the required consistency with the local comprehensive plan is omitted.
34. The reference to Section 4.3A should be changed to 4.3 (all provisions of that section apply) and the reference to "erosion and sediment control requirements" be removed, since they are not addressed in that section. (See note 29 above.)
35. Subsection C omits the provision in the Regulations which allows local governments to require water quality impact assessments (WQIAs) in RMAs when deemed necessary. This omits some of the local discretion granted to local governments in the Regulations. Although local governments have flexibility in establishing specific requirements for the water quality impact assessment, the Department believes that a threshold of "one acre of land disturbance" is too large for the **minor** water quality impact assessment.